UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON D.C.

DURHAM SCHOOL SERVICES, L.P.,	)	
	)	
Respondent,	)	
	)	
And	)	Case 15-CA-106217
	)	15-CA-112948
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN	)	15-CA-145094
AND HELPERS LOCAL UNION NO. 991	)	15-CA-145797
A/W INTERNATIONAL BROTHERHOOD OF	)	
TEAMSTERS,	)	
	)	
Charging Party	)	

RESPONDENT'S REPLY BRIEF TO GENERAL COUNSEL'S ANSWERING BRIEF

NOW COMES Durham School Services, L.P., Respondent herein, and files this Reply Brief to General Counsel's Answering Brief.

INTRODUCTION

On October 30, 2015, Judge Michael A. Rosas issued his decision finding that Respondent had violated section 8(a)(1) of the Act in certain respects. The judge recommended that certain other allegations, including the sole § 8(a)(3) allegation regarding Diane Bence, be dismissed. On December 4, 2015, Respondent filed exceptions to the judge's decision and a supporting brief. The General Counsel filed an answering brief on February 26, 2016. Respondent now files its Reply Brief.

DISCUSSION

The General Counsel's answering brief largely mimics the judge's analysis, which has been fully addressed in Respondent's brief in support of exceptions. Only a few points warrant any reply.

A. The Unalleged Violations Found By The ALJ Were Not Fully Litigated.

The judge found that in early May 2014 Rob Bauman and Bob Downin separately interrogated Diane Bence regarding what she intended to say at the AGM in London. (JD 12: 21-31). The Third Consolidated Complaint, however, did not make any such allegations. Further, the General Counsel never sought to amend the complaint at the hearing to include these allegations. Nevertheless, the General Counsel argues in his answering brief that these issues were fully litigated. This argument is without merit.

The Board may not find a violation in the absence of a specific complaint allegation unless "the issue is closely connected to the subject matter of the complaint and has been fully litigated." *Pergament United Sales, Inc.,* 296 NLRB 333, 334 (1989), *enf'd,* 920 F.2d 130 (2d Cir. 1990). Although the issues presented herein are "closely connected" to the complaint allegations, they were not fully litigated. The "fully litigated" prong of the test is required by the due process clause of the Constitution, and "rests in part on whether the absence of a specific allegation precluded a respondent from presenting exculpatory evidence or whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made." *Id.* at 335. The Board also considers whether the "violation is established by the testimonial admissions of the Respondent's own witnesses," *Id.* at 334, as well as the extent to which the allegation was litigated, argued, and briefed. *Hi-Tech Cable Corp.*, 318 NLRB 280, 280 (1995), *enf'd in pert. part,* 128 F.3d 271 (5th Cir. 1997).

The judge's finding that Bob Downin unlawfully interrogated Bence clearly must be reversed. The consolidated complaint contained no allegations against Downin, who had been terminated by Respondent and did not even appear at the hearing. Respondent had no knowledge that it would need to subpoena Downin as a witness, and thus was precluded from offering any

defense. Where the alleged perpetrator of the unalleged unfair labor practice does not appear as a witness or appears but is not questioned regarding the unalleged allegation, the Board has held that the issue was not fully litigated. *Joe's Plastics, Inc.*, 287 NLRB 210, 210 (1987). Such is the case here, and no finding may be made regarding Downin.

As for the unalleged conversation with Bauman, the issue was not litigated, fully or otherwise. On direct examination, the General Counsel did not elicit any testimony from Bence regarding this subsequent conversation with Bauman. Instead, Bence volunteered this testimony in response to a question from Respondent's counsel as to whether Bauman had told Bence to have a "good time" on her trip to London. Counsel's question merely asked if Bauman had made this comment in an earlier conversation. Bence replied that Bauman had made the comment, but that it was during a subsequent conversation at the bus.[1] In her answer to the question, Bence volunteered that during this subsequent conversation, Bauman asked her what she planned to talk about at the AGM. (Tr. 145). Respondent's counsel asked no further questions regarding this conversation, and all Counsel for General Counsel asked on redirect was when the conversation occurred and whether anyone else was present. (Tr. 149). The conversation had relevance to the § 8(a)(3) animus issue, but Respondent had no reason to suspect that the judge might actually base an unfair labor practice finding on this alleged conversation. When Bauman testified, neither counsel specifically questioned him about this subsequent conversation. Respondent's counsel did ask Bauman if he had told Bence to have a "good time," but he denied making the statement, and no further questions were asked on this subject. No one asked Bauman if he had questioned Bence regarding what she intended to discuss at the AGM. (Tr. 295-296).

[1] Although it is not reflected in the record, Bence had stated in her pre-trial affidavit that Bauman had told her to have a "good time." Respondent's counsel sought to elicit this testimony to rebut the alleged animus toward Bence, which was relevant to the § 8(a)(3) allegation.

Thus, what we are left with is a snippet of testimony from Bence that was volunteered on cross examination in response to a question that was limited to whether, at an earlier time, Bauman had told her to have a good time. Respondent was not put on notice that this conversation was in issue or had any significance other than it was part of the res gestae surrounding the specific allegations in the complaint. Had Respondent's counsel known that this conversation was being placed specifically in issue, he certainly would have asked more specific questions and elicited greater detail.

Significantly, the General Counsel did not argue in his post-hearing brief that this particular conversation between Bauman and Bence should result in an unfair labor practice finding. What he argued was that this conversation undermined Respondent's claim that Bauman's earlier questioning of Bence (which was alleged in the complaint) was solely intended to determine whether the requested leave was in accordance with Respondent's policy. The General Counsel, however, never requested that the ALJ find a separate unfair labor practice based on this conversation. (GC Brief to ALJ at 23-24). Although the Board may find a violation based on a fully-litigated *complaint allegation,* even when the General Counsel fails to argue the violation or even seeks to withdraw the allegation, *Sheet Metal Workers, Local 162*, 314 NLRB 923, n. 2 (1994), the Board surely may not find a violation when the General Counsel has both failed to allege the violation and declined to argue to the ALJ that a violation should be found. To do so is to usurp the General Counsel's unreviewable prosecutorial discretion.

Because the issues were not alleged in the complaint and were not fully litigated, Respondent requests that the Board reverse the judge's finding regarding Downin and his finding regarding a subsequent interrogation by Bauman.

B. The Location Of The Alleged Interrogation In London Is Significant.

As set forth in Respondent's brief in support of exceptions, David Duke did not unlawfully interrogate Diane Bence in London, even assuming, *arguendo,* that the Board had jurisdiction over this allegation. One of the points advanced by Respondent was that the judge erred by discounting the foreign location of the conversation. According to the judge, the location was "no more significant than if she made the statement at a restaurant across the street from her workplace." (JD 14: 10-15). The General Counsel argues in response that Respondent mischaracterized the ALJ's conclusion and that the judge's "point was that, once the Board's jurisdiction is established over the interrogation, the location of Bence's comment does not matter." (GC Answering Brief at 12). This, however, is a distinction without a difference. Regardless of characterization, the judge clearly deemed the location of the alleged interrogation immaterial. The issue is not whether Bence had a protected right to engage in union activity in London. Rather, the issue is whether Duke's questioning of Bence about those activities was sufficiently coercive to violate § 8(a)(1). And on this question, the place of the interrogation is one of the critical factors that the Board evaluates.

The Board has long held that the location of the questioning is an important factor is assessing the potential for coercion. *Sunnyvale Medical Clinic, Inc.,* 277 NLRB 1217, 1218 (1985). *Rossmore House,* 269 NLRB 1176, n. 20 (1984), *enf'd,* 760 F.2d 1006 (9th Cir. 1985). In *Raymond Engineering, Inc.,* 286 NLRB 1210, 1230 (1987), the Board declined to find a violation when the alleged interrogation "occurred in a casual atmosphere away from Respondent's workplace," i.e., a bar. In *Montgomery Ward & Co.,* 145 NLRB 846, 857 (1964), the Board found no unlawful interrogation where the conversation "took place on coffee break outside the plant." As set forth in Respondent's brief in support of exceptions, the conversation

between Duke and Bence occurred in London outside a meeting where Bence had openly appeared on behalf of the Union and had openly spoken out about various workplace issues. She was there not as an employee of Respondent, but as a proxy for a shareholder. In these circumstances, there was a clear absence of coerciveness, and Respondent requests that this allegation be dismissed.

CONCLUSION

Respondent requests that the Third Consolidated Complaint be dismissed in its entirety.

Respectfully submitted, this 9th day of February 2016.

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I certify that this day I served the foregoing REPLY BRIEF on the following persons by electronic mail:

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Dated this 9th day of February 2016.

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